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## WHAT ARE SCHOOL DISTRICTS' OBLIGATIONS TO ENGLISH LANGUAGE LEARNERS?

On January 7, 2015, the Office for Civil Rights (OCR) and the Department of Justice (DOJ) issued joint guidance on public school obligations to English Language Learners (ELL) in the form of a "Dear Colleague" Letter. See <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-el-201501.pdf>.

The letter is extensive and highlights both departments' commitment to enforcing Title VI of the Civil Rights Act of 1964 (Title VI). This article summarizes how this guidance relates to Pennsylvania school districts and their obligations to ELL students pursuant to both federal and Pennsylvania law.

The departments highlighted common civil rights issues that both OCR and the DOJ frequently investigate and for which they find school districts in non-compliance. They include:

1. Identifying and assessing ELL students in need of language assistance in a timely, valid, and reliable manner;
2. Providing ELL students with a language assistance program that is educationally sound and proven successful;
3. Sufficiently staffing and supporting the language assistance programs for ELL students;
4. Ensuring ELL students have equal opportunities to meaningfully participate in all curricular and extracurricular activities, including the core curriculum, graduation, specialized and advanced courses and programs, sports, and clubs;
5. Avoiding unnecessary segregation of ELL students;
6. Ensuring that ELL students with disabilities under the Individuals with Disabilities Education Act (IDEA) or Section 504 of the Rehabilitation Act of 1973 are evaluated in a timely and appropriate manner for special education and disability-related services and that their language needs are considered in evaluations and delivery of services;
7. Meeting the needs of ELL students who opt out of language assistance programs;
8. Monitoring and evaluating ELL students in language assistance programs to ensure their progress with respect to acquiring English proficiency and grade level core content, exiting ELL students from language assistance programs when they are proficient in English, and monitoring exited students to ensure they were not prematurely exited and that any academic deficits incurred in the language assistance program have been remedied;
9. Evaluating the effectiveness of a school district's language assistance program(s) to ensure that ELL students in each program acquire English proficiency and that each program is reasonably calculated to allow ELL students to attain parity of participation in the standard instructional program within a reasonable period of time; and
10. Ensuring meaningful communication with parents.

The departments generally highlighted every possible area in which a school district could make a mistake and violate the law. How, then, can a district avoid trouble when there are so many areas of concern?

First, a school district must take affirmative steps to identify ELL students in a timely manner, which the departments define as the first thirty days of enrollment. Most school districts use a home language survey at the time of enrollment to gather information about a student's language background. Based on the responses to the home language survey, in Pennsylvania, a student must be assessed for potential placement in a program unless the student can meet two of the following criteria:

- (1) Final grades of B or better in core subject areas (mathematics, language arts, science, and social studies);
- (2) Scores on district-wide assessments that are comparable to the basic performance level

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on the PSSA; and/or

- (3) Scores of basic in reading, writing, and mathematics on the PSSA or an equivalent assessment from another state.

If a newly-enrolled student does not have academic records, the student must be assessed. Pennsylvania requires that school districts use the WIDA Access Placement Test. While parent notification is required, parent permission to assess is not required. Additionally, parents in Pennsylvania cannot “opt out” of ELL programming unless the instruction conflicts with a parent’s religious beliefs. See Educating Students with Limited English Proficiency (LEP) and English Language Learners (ELL), Pennsylvania Department of Education, Basic Education Circular:

<https://www.pa.gov/agencies/education/resources/policies-acts-and-laws/basic-education-circulars-becs/pa-code/educating-english-learners-els.html>.

The second way a school district can avoid a complaint is to provide ELL students with an appropriate language assistance program. Applicable federal civil rights laws do not require a particular program or method of instruction for ELL students. However, the standard for the program is based on a Fifth Circuit Court of Appeals 1981 case that has been adopted by the departments and Pennsylvania’s Department of Education. In *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), the court held that a program must be:

- (1) based on educational theory recognized as sound by some experts in the field or considered by experts as a legitimate experimental strategy;
- (2) reasonably calculated, including provisions for resources and personnel, to implement the theory effectively; and
- (3) evaluated and adjusted where needed to ensure language barriers are actually being overcome.

In Pennsylvania, direct English language instruction may not take place during other content classes which are required under 22 Pa Code §4. Additionally, language services must include daily instruction. Exact hours of direct language instruction must be determined based on student need and program/instructional delivery model.

The Pennsylvania Department of Education’s (“PDE”) guidelines for school districts to consider are:

- Entering (level 1)/Beginning (level 2) students: 2 hours
- Developing (level 3): 1-2 hours
- Expanding (level 4): 1 hour
- Bridging (level 5): up to 1 hour

It is important to remember that an ELL program does not only include direct language instruction but also includes accommodations in the academic content areas to ensure that ELL students are provided meaningful and comprehensible access to instruction in all areas. Specialized instruction should be designed so that ELL students can meet grade-level standards within a reasonable period of time. This also means that ELL students should be placed into age-appropriate grade levels so that they can have meaningful access to grade-appropriate curriculum.

Another issue that arises frequently is whether ELL students can be retained. A student may not be retained in a grade based solely on a student’s lack of English language proficiency. If an ELL student is retained in a grade, the school district must be able to demonstrate that all appropriate modifications were made to student’s instruction and assessment in order to allow an ELL student meaningful access to the general

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education curriculum as well as to promote second language learning. See PDE BEC citing *Lau v. Nichols*, 414 U.S. 563 (1974).

Many school districts have questions when ELL students also have special education needs. Oftentimes school districts do not know how long to wait until they evaluate for special education. It is dangerous to wait too long to evaluate an ELL student for special education services due to pre-set rules requiring such students to complete a certain, pre-determined time period in the ELL program before referring a child suspected of having a disability for a multidisciplinary team evaluation. This kind of steadfast rule may lead a district into a possible special education child find violation. It is important to individually assess each ELL student's performance and determine if a special education is warranted regardless of the amount of time spent in the ELL program.

Once a school district determines that an ELL student is a child with a disability who qualifies for special education, the school district is responsible for determining, through the development of an Individualized Education Program (IEP) at an IEP meeting, the special education and related services necessary to make a Free Appropriate Public Education (FAPE) available to the child. The language needs of the student must be considered. ESL/bilingual programs are identified in the Pennsylvania School Code of 1949 as general education curricula. Therefore, the IEP team must consider what kind of specially designed instruction and/or accommodations are needed in the student's ELL program. Special education services do not replace an ELL program. ELL students with disabilities are entitled to receive the ELL program until a student is exited from the program.

The last area we want to highlight in trying to avoid a complaint is to ensure meaningful communication with parents. Similar to ELL students, school districts must have a process to identify parents who have language needs. Title VI mandates that communication with parents must be in the parent's preferred language and mode of communication. It is a school district's responsibility to provide for written translation and/or oral interpretation services. In Pennsylvania, PDE provides translated documents, and other forms can be found at the Pennsylvania Training and Technical Assistance Network (PaTTAN). Depending on a particular school district's population, budgeting for translator services could be necessary.

In summary, this new letter from OCR and the DOJ stresses the federal government's commitment to ensure that both states and local educational agencies are providing meaningful ELL programs and are providing equal educational opportunities to this needy student population. Pennsylvania school districts should be prepared for PDE to eye with greater scrutiny the ELL programs in each district.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.